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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 951

SEANOR COAL COMPANY, a corporation, Petitioner

v.

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and APPENDIX

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	9
Court Decisions Below	12
Reasons for Granting the Writ	15
Conclusion	21

Appendix:

Opinion of the District Court Filed July 14, 1966	22
Amended Order for Summary Judgment Filed August 2, 1966	33
Opinion of the Third Circuit Court of Appeals Filed August 16, 1967	34
Denial of Rehearing by Third Circuit Court of Appeals Filed September 28, 1967	50
1964 Labor Agreement between Petitioner and United Mine Workers	51

CITATIONS

Cases

United Mine Workers v. James M. Pennington, et al., 381 U.S. 657 (1965)	21
Bey v. Muldoon, 354 F. 2d 1006 (3d Cir. 1966)	17
Lewis v. Lowry, 295 F. 2d 197 (4th Cir. 1961)	18
Auten v. IBEW, 51 LC. ¶19,552 (U.S.D.C. Cal. 1964)	18
NLRB and Bituminous Coal Operators Assoc., 165 NLRB No. 49 (1967)	16, 21

Citations.

Statutes

National Labor Relations Act (61 Stat. 136, 29 U.S.C. §§ 51 et seq.)

Section 8(e) 3

Section 302 3

Sherman Act (26 Stat. 209, 15 U.S.C. §§ 1 and 2) .. 6

Miscellaneous

Bureau of National Affairs, Wash., D.C. *Collective Bargaining Negotiations and Contracts,* p. 44:301 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Seanor Coal Company, petitioner, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 16, 1967, in which the Court affirmed the District Court's Order for Summary Judgment on three counts.

OPINIONS BELOW

The Opinion of the District Court for the Western District of Pennsylvania, entered July 14, 1966, is reported at 256 F.S. 456 (Appendix p. 22). The Opinion of the United States Court of Appeals for the Third Circuit is reported at 382 F.2d 437 (Appendix p. 34). The Order of Court denying Petition for Rehearing is also reported at 382 F.2d 437 (Appendix p. 50).

JURISDICTION

The Order of the Circuit Court denying the Petition for Rehearing was entered September 28, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The jurisdiction of the District Court was by virtue of 28 U.S.C. §1332(1).

QUESTIONS PRESENTED

I

Does Section 302(c)(5)(B) of the National Labor Relations Act invalidate a jointly negotiated and mutually agreed upon oral modification of an employer's collective bargaining duty to contribute to a Welfare Trust Fund as decided by the Courts below on a Motion for Summary Judgment?

II

Was the question of the severability of the 40¢ per ton and 80¢ per ton royalty payment requirements under the 1964 Bituminous Coal Wage Agreement properly decided on a Motion for Summary Judgment in the Court below?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., §§151, et seq.) are as follows:

"Section 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void."

* * *

"Section 302(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer

who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)."

* * *

"Section 302(c) The provisions of this section shall not be applicable

* * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive

benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an

annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds."

The relevant provisions of the Sherman Act, as amended (26 Stat. 209, 15 U.S.C. §§ 1 and 2) are as follows:

"§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears,

the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

I. Background

Petitioner is a West Virginia corporation and during the periods involved in the instant litigation was engaged in the operation of coal mining in Westmoreland County, Pennsylvania within the jurisdiction of the United States District Court for the Western District of Pennsylvania.

Respondents are Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950. This Fund was originally created by the National Bituminous Coal Wage Agreement of 1950. The Fund conducts its business principally at 907 - 15th St., N.W., Washington, D. C.

In February, 1965, petitioner terminated operations of its mines. Shortly thereafter, a Union representative ". . . on behalf of his Union and its membership" assured defendant that if the mines would reopen, the productivity per employee would be increased sufficiently to enable defendant to meet its obligations under the labor contract. In reliance on this promise made on behalf of beneficiaries of respondents' trust, petitioner reopened its mines, but its employees failed to increase their productivity. Petitioner's operations were again terminated on or about June 30, 1965 and have not been resumed.

In August, 1965, Respondents filed suit against petitioner. Count I of the Complaint demanded payment by defendant of $52,441.82 by virtue of respondents exercise of an acceleration clause contained in a Promis-

sory Note executed by the parties on or about August 5, 1964. Acceleration was based upon an alleged default by petitioner in making royalty payments allegedly due for the months of February through June, 1965, pursuant to the terms of the then existing labor agreement between defendant and United Mine Workers of America (App. p. 51).

Count II of the Complaint demand payment in the amount of $38,110.93 being the money value of the royalty payments allegedly due from defendant for actual coal production during February through June, 1965 pursuant to the terms and conditions of the same labor agreement.

Respondents' claims under both Counts of the Complaint thus depended upon its allegation that petitioner was contractually obliged to pay a royalty for each ton of coal produced between February 1 and June 30, 1965.

In response to these allegations, petitioner asserted three defenses:

1) The provision of the 1964 Bituminous Coal Wage Agreement between petitioner and United Mine Workers of America requiring the payments of royalties on coal mined is violative of Section 8(e) of the National Labor Relations Act, as amended, being a prohibited "hot cargo" provision.

2) Petitioner asserted and offered to prove that this same royalty provision was the result of a conspiracy by the Union and large coal operators to restrain competition with small operators such as petitioner in violation of the Sherman Anti-Trust Act, 15 U.S.C. §1, et seq.

3) Petitioner contended that the promises of increased productivity recited above constituted either an oral modification of its obligation to pay royalties or provided a basis for estopping respondents from enforcing such payments.

By way of counterclaim, petitioner sought judgment against respondents for all amounts previously contributed under the terms of the royalty provision of the 1964 collective bargaining agreement, prior to its oral modification.

On July 14, 1966, the District Court entered its Order Granting Summary Judgment for respondents and against petitioner under Counts I and II of the Complaint and under petitioner's counterclaim (App. p. 33).

On August 16, 1967, the Circuit Court issued its Opinion affirming the District Court's Opinion on all counts (App. p. 34).

On September 28, 1967 rehearing was denied (App. p. 50).

COURT DECISIONS BELOW

Illegality of the Oral Modification

At the heart of petitioner's defense was the fact that the Company and the Union had in their own enlightened self interest amended the obligation of the Company to make welfare payments so that the employer was encouraged and induced to reopen its mines and to provide jobs to almost 100 employees.

The District Court, in its Opinion (App. p. 30), ruled that "The oral modification claimed by Defendant here would be contrary to public policy enuniciated by Congress in 29 U.S.C.A. 186 (c) (5) (B) . . . requiring that their [trust fund] terms be specified in writing."

The Court thus took the position that the statutory language barred the subsequent oral modification. No legislative history, statutory analysis or precedent cases were cited.

The Circuit Court, in its majority opinion (App. p. 43) discards this basis for finding illegality in the oral modification. Indeed, that Court said:

> ". . . the language seems to look to payments to be made out of the fund by the trustees to the employees."

But, finding no support in the statutory wording, the Court found instead that "the policy of §302 (c) (5) requires that any modification of the basis of both the payments into the fund and out of the fund be made in writing."

In his dissent (App. p. 47), Circuit Judge McLaughlin argued:

> ". . . I think it very clear that Section 302(c)(5)(B) of the L.M.R. Act does not touch the validity of the oral modification before us. In our Bey v. Muldoon, 354 F.2d 1005 (3 Cir. 1966) we affirmed the District Court in holding regarding 302(c)(5)(B) that 'Reference to the legislative history shows that the Act was intended to prohibit any receipt of money by unions from employers unless the precise use to which the money shall be put is deliniated.' Absent a statutory provision that the oral modification involved is required by statute to be in writing that subsequent agreement is itself a valid contract. United Shoe Workers, etc. v. LeDanne Footwear, Inc., 83 F. Supp. 714 (D. Mass. 1949)."

The Severability Issue

In its Answer, Petitioner in the Courts below argued that the Retirement Fund Clause of the 1964 collective bargaining agreement between the parties, (App. p. 55) prior to oral modification, was violative of Section 8(e) of the National Labor Relations Act and at oral argument on the Summary Judgment Motion, Petitioner also argued that the same clause was violative of the Sherman Act.

The District Court disposed of this contention by concluding that the forty cent (40¢) per ton royalty and the eighty cent (80¢) per ton royalty are not interrelated (App. p. 25). Additionally, the Court found that it was without jurisdiction to pass on the allega-

tion concerning illegality under the National Labor Relations Act (App. p. 26).

The Circuit Court affirmed on the theory that the two provisions are "radically different" from each other (App. p. 37).

In his dissent, Circuit Court Judge McLaughlin commented:

> "... From any reasonable viewpoint such an arbitrary disposal of the 1964 Amendment cannot be accomplished on this summary motion. At the very least appellant is entitled to its day in court to show the intent of the parties wtih reference to the Amendment. Genuine, substantial questions of fact were presented to the District Court. They called for a trial on the merits of those issues, including the counter-claim of the defendant."

Rehearing was denied on September 28, 1967 without a written opinion (App. p. 50).

REASONS FOR GRANTING THE WRIT

Implicit in the lower Court ruling on the question of oral modification is a rule of law that the detailed basis for contributions to pension or welfare funds must be specified in writing.

But, such a ruling would render invalid and violative of law literally thousands of existing agreements.

It is regularly observed in collective bargaining agreements, that while benefits to be paid out are specified in writing, financing and funding of the benefits is left to the discretion of the employer, with *no details* being set forth in writing.

The Bureau of National Affairs, in its publication, *Collective Bargaining Negotiations and Contracts,* at p. 44:301 comments as follows:

> "For the most part, both contributory and noncontributory plans are written on the basis of benefits rather than of costs, so far as the employer is concerned. (Contributory plans, of course, invariably prescribe a specific rate of employee contributions.) The employer, in other words, agrees to provide certain benefits and must pay whatever costs are involved. A minority of plans, however, provide for a specified rate of contribution on the part of the employer, and in such cases a statement is sometimes included to the effect that benefits will be provided only to the extent that funds are available.
>
> "Methods of funding pensions vary widely. Under a minority of plans, benefits are purchased directly from an insurance company. More often, a

trust fund is established from which benefits are paid directly. (Some trusteed plans, however, permit pension benefits to be provided from the fund through insurance contracts.) According to some plans, management is free to determine the manner of providing benefits."

It is reasonable to believe that Congress was aware of this fact and it is equally unreasonable to believe that they desired the Courts to stretch and twist Section 302 to impose criminal sanctions upon management and union for continuing these practices.

In reaching its conclusions that the oral modification was invalid, the Circuit Court stated as follows:

". . . Congress knew that agreements such as the National Bituminous Coal Wage Agreement were the result of industry-wide bargaining and were to bind numerous employers. It knew, of course, that the elaborate collective bargaining agreements which resulted were reduced to writing;[19] it could hardly have intended that individual operators should be permitted to enter into oral side agreements with local union officials cancelling out those provisions dealing with the significant subject of payments into the union welfare fund. . . ."

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19. See §8(d), 29 U.S.C. §158(d); H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

But, this industry-wide bargaining theory was rejected by the National Labor Relations Board. In their latest Decision and Order, which came down after oral argument on the instant case, the Board held in *NLRB*

and Bituminous Coal Operators Assoc., 165 NLRB No. 49 (1967):

> ". . . As noted above, we rejected in the earlier *Lewis* case the contention that there is a single industrywide bargaining unit coextensive with the signatories to the UMW national agreement. This finding was based upon the pattern of bargaining within the industry—conducted on a separate basis by various associations and individual operators — and the consequent lack of the requisite joint intention by all signatories to be bound by group, rather than individual action. . . ."

In the eyes of the Labor Board, the petitioner and the Union were bargaining concerning their own individual needs and wishes. They were not engaged in any multi-employer bargaining and they were themselves the judge and jury of what benefit funding arrangements best met their needs.

The issue presented raises a substantial federal question which has not been, but should be ruled on by this Court. The growth and complexity of today's pension and welfare funding has magnified the importance of obtaining from this Court a definitive ruling on the meaning of Section 302(c)(5)(B).

At present there is evidence of a conflict in the Circuits on this question. Indeed, the Circuit Court's ruling in the instant proceeding would appear to overrule its earlier decision of *Bey v. Muldoon,* 354 F.2d 1005 (3d. Cir. 1966). In that case the Circuit Court affirmed per curiam the District Court's conclusion that:

> " 'Reference to the legislative history shows that the Act was intended to prohibit any receipt of

money by unions from employers unless the precise use to which the money shall be put is delineated.' "

In the case of *Lewis v. Lowry,* 295 F.2d 197, 200 (4th Cir. 1961), that Circuit takes the position that:

". . . The trustees have no independent right to insist that an operator make any contribution to the fund, or that it do so on the same basis and under the same formula that other operators contribute. The trustees are the third party beneficiaries of the real agreement between the union and operator, which they may enforce in accordance with its terms, but the fact that the suit is brought for the benefit of the third party beneficiaries would not foreclose a defense that there was no contract or that the writing upon which the complaint is based is not, in fact, the real agreement between the operator and the union."

The *Lowry* case is interesting additionally because it too was a summary judgment proceeding which was reversed and remanded for that reason.

In the case of *Auten v. IBEW,* 51 LC ¶19,552 (U.S.D.C. So. Dist. of Cal. No. 64-1670), the Court recited the conflict on this point:

"The cases are in conflict on this point. In *Employing Plasterers' Assn. v. Journeymen P.P. & B. Soc.,* [41 LC ¶16,516] 186 F. Supp. 91 (N.D. Ill. E.D. 1960), the court held that the phrase is meant to cover payments by the employer to the fund and is not concerned with payments to the employees. However, in *Bey v. Muldoon,* [48 LC ¶18,676] 223 F. Supp. 489 (E.D. Pa. 1963), the court construes

the phrase to cover payments from the fund to the employees."

* * *

"In *Arroyo v. United States,* [37 LC ¶65,404] 359 U. S. 419 at 426, 1959, the United States Supreme Court stated:

> 'Congress believed that if welfare funds were established which did not define with specificity the *benefits payable thereunder,* a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or for personal gain. [Citations] To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established.' (Italics added).

"In order to accomplish this purpose § 186(c)(5)(b) should logically be construed as relating to the detailed basis on which benefit payments are to be made from the fund to the employees in order to insure proper disbursement of these funds."

This conflict of decisions requires resolution by this Court, particularly since the question is, as stated above, an increasingly recurring one in the administration of Section 302.

Should the decisions below be allowed to stand, the long recognized propriety of oral labor agreements as enforceable in law will be placed into doubt. In his dissent, Circuit Judge McLaughlin stated:

"Both equitable estoppel and oral modification of the 1964 labor contract were urged by appellant in the District Court as defeating the present action. The trial judge held that such oral modification was against public policy on the strength of Lewis v. Harcliff Coal Co., 237 F. Supp. 6, 8 (W.D. Pa. 1965). The oral agreement there was prior to the written contract The decision is no authority to uphold the brazen repudiation of the subsequent oral agreement in this appeal. This Court in Burlesque Artists Assn. v. Hirst Enterprises, Inc., 267 F. 2d 414 (3 Cir. 1959) affirmed a judgment where the jury had found that there had been a valid subsequent oral addition to the original written labor agreement. This recognition of subsequent oral modification of collective bargain contracts is viewed as sound in labor arbitration practice. Gertman Co., Inc. 45 LA 30 (Thomas Kennedy Arbitration 1965). Metropolitan Transit Authority, 39 LA 849 (W. Fallon Arbitration, 1965)."

Petitioner submits that the question of the construction of the 1964 royalty payment provisions of the written agreement between the parties should not be resolved without a full hearing on the intent of the parties, prior bargaining history, etc.

The prior cases which validated the forty cent (40¢) per ton royalty are no precedent for validation of said payment now, if in fact, the parties have coupled it together with an eighty cent (80¢) per ton royalty payment for an illegal purpose under either the National Labor Relations Act or the Sherman Act.

Conclusion.

In view of this Court's holding in *United Mine Workers v. James M. Pennington, et al.*, 381 U.S. 657 (1965) and the National Labor Relations Board's opinion of illegality of the eighty cent (80¢) provision, *NLRB and Bituminous Coal Operators Assoc.*, 165 NLRB No. 49, the whole issue raises substantial federal questions entitling Petitioner to his day in Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion

WEBER, J. July14,1966

This case is presented on Plaintiff's Motion for Summary Judgment. Plaintiffs are Trustees of the Welfare and Retirement Fund of 1950 of the United Mine Workers of America and sue for royalties claimed by reason of the production of coal by Defendant under the provisions of the National Bituminous Coal Wage Agreement of 1950, as amended effective April 2, 1964, [herein called the Agreement] executed between Defendant and the United Mine Workers of America. The royalty claim is for forty (40¢) cents per ton on 95,277.32 tons of coal produced between February 1, 1965 and June 30, 1965, in the amount of $38,110.93. This claim constitutes Count Two of Plaintiff's Complaint. Defendant admits the production of this amount of coal during the period in question, but denies that it is obliged to pay the royalty because of the defenses raised.

Plaintiffs in a separate count [Count I of the Complaint] also claim the balance due of $52,441.82 under a promissory note from Defendant to Plaintiffs under which Defendant agreed to pay monthly installments. The note contained an acceleration clause providing that in the event of Defendant's default in the payment of any installment due under the note, or in the event of default in making royalty payments under the Agreement, the entire balance on said note became due and payable forthwith. Defendant admits the amount remaining unpaid on the note as claimed but denies that

it is presently due and payable because of the defenses raised.

Defendant's Answer raises the following defenses as a matter of law to both Counts of plaintiffs' claim:

1. [Second Defense]. The Welfare and Retirement Fund Clause of the Agreement is illegal under § 8 (e) of the National Labor Relations Act, 29 U.S.C.A. 158 (e).

2. [Third Defense]. Plaintiffs are barred by the doctrine of equitable estoppel by reason of the representations made by the United Mine Workers of America upon which Defendant relied in reopening its mines.

In its brief and argument Defendant added to its Second Defense of illegality a charge that the Agreement is violative of the federal anti-trust laws. Defendant has also argued that the facts alleged in support of its Third Defense constitute a subsequent oral modification of the Agreement.

Based on its defense of illegality of the Agreement, Defendant asserts a counterclaim for $88,322.20 for payments which it has already made to Plaintiffs' Fund under the 1964 Agreement. Plaintiffs admit receipt of this amount.

Plaintiffs have moved for Summary Judgment on their claim and in their favor as to Defendant's counterclaim on the grounds that as to the defenses raised there is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law.

In considering the Motion for Summary Judgment we take all reasonable intendments and inferences from

the pleadings against the movant and in favor of the opponent.

I. *The Illegality Issue.*

Defendant's Second Defense is based upon the decision of the National Labor Relations Board issued May 14, 1964, in the case of *United Mine Workers and Bituminous Coal Operators,* 148 N.L.R.B. No. 31, which held the Welfare and Retirement Clause of the 1964 Agreement illegal as violative of § 8 (e) of the National Labor Relations Act. The particular provision of the Welfare and Retirement Clause in issue there was the provision of the 1964 Amendment which provided:

> "On all bituminous coal procured or acquired by any signatory Operator for use or for sale [i.e. all bituminous coal other than that produced by such signatory Operator] there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so produced or acquired on which the aforesaid sum of forty cents (40¢) per ton has not been paid into said fund prior to such procurement or acquisition."

The National Labor Relations Board decision was in response to a Motion by the United Mine Workers of America to declare the 1964 Amendment containing the above new provision to be valid under § 8 (e) of the National Labor Relations Act, and thus to find the United Mine Workers of America in compliance with the terms of a prior cease and desist order. The motion was re-

fused, and the specific question is still pending. Neither the Board nor any Court has ruled the 1964 Welfare and Retirement Clause to be illegal. A Trial Examiner on March 22, 1966, in the case of *United Mine Workers of America and Bituminous Coal Operators,* [Daily Labor Report, 3-22-66, No. 56 E-1] found the eighty (80¢) clause to be violative of § 8 (e) of the National Labor Relations Act and issued the following recommended order:

> ". . . [the parties] shall cease and desist from: (a) Maintaining, enforcing, or giving effect to the 80 cent provision in the 1946 Amendment to the National Bituminous Coal Wage Agreement of 1950."

Plaintiffs' present claim is not being made under the eighty (80¢) cents per ton royalty provisions, which first appeared in the 1964 Amendment to the Agreement to cover "supplementary Coal," but under the forty (40¢) cent per ton royalty provision covering coal produced for use or sale, which has been part of the Agreement since 1950 [although raised from thirty (30¢) cents to forty (40¢) cents per ton during that time]. Defendant argues that the Welfare and Retirement Clause is an integrated agreement and that none of its provisions can survive if any of them are found illegal. With this we do not agree. The history of the forty (40¢) cent and the eighty (80¢) cent royalty provisions differ, the forty (40¢) cent royalty provision was in effect alone for many years before the addition of the eighty (80¢) cent provision.

> "The test is whether the agreement sought to be enforced can be separated from the illegal acts or agreements relied upon as avoiding it, and whether

the plaintiff requires any aid from or must in any way rely upon the illegal transaction in order to establish his case."

17 Am. Jur. 2d *Contracts* § 219.

Under the rule of *Lewis v. Benedict Coal Corporation,* 361 U. S. 459 (1960) the forty (40¢) cent per ton royalty is part of the compensation of the miner, and is earned when the coal is produced. This being so, then the partial or even the entire invalidity of the Agreement would not alter the obligation to pay for the work already performed. In *National Labor Relations Board v. Rockaway News Supply Co. Inc.,* 345 U. S. 71 (1953), the Supreme Court held that while the National Labor Relations Board had determined that the bargaining agreement was void ab initio, the contract terms under which the labor was performed must still be given effect. Similarly in *Garment Workers v. NLRB,* 366 U. S. 731 (1961), the Court held that the invalidity of a collective bargaining agreement because of an unfair labor practice did not vary or overturn the terms and conditions of employment fixed by the agreement.

We, therefore, conclude that the obligation of Defendant to pay the forty (40¢) cents per ton royalty on coal already mined is not altered or affected by allegations that the Welfare and Retirement Clause contains a provision for an eighty (80¢) cent per ton royalty which is illegal as an unfair labor practice.

In addition, we do not find it within the jurisdiction of this court to pass upon the allegation that the entire Welfare and Retirement Clause of the Agreement is an unfair labor practice, and thus illegal. This is a

matter within the exclusive jurisdiction of the National Labor Relations Board. *Pennington v. United Mine Workers of America,* 325 F. 2d 804 (6th Cir. 1963); *Portland Web Pressmen's Union v. Oregonian Publishing Co.,* 286 F. 2d 4 (9th Cir. 1960); cert. den. 366 U. S. 912; *Marine Engineers Beneficial Assoc. v. Interlake Steamship Co.,* 370 U. S. 173 (1962); *Iron Workers v. Perko,* 373 U. S. 701 (1963); and *San Diego Bldg. Trades Council v. Garmon,* 359 U. S. 236 (1959).

While not raised in its Answer, Defendant argued a question of illegality of the Agreement because of possible violation of the anti-trust laws. We feel that as to the within Plaintiffs, the Trustees of the Fund, the argument has no application. In *Lewis v. Pennington,* 325 F. 2d 804 (6th Cir. 1963), cert. den 381 U. S. 949, the Circuit Court, in affirming the District Court's ruling that there was no evidence that the Trustees engaged in a conspiracy to violate the anti-trust laws [as distinguished from the United Mine Workers of America], stated further:

(p. 518)

". . . if was not necessary for him [the District Judge] to rule upon Phillips' contention that such a violation of the Sherman Act, if it had occurred, was a bar to the right of the Trustees to recover in this action. However, should it be that that ruling and our concurrence in it is not the correct one, we are nevertheless of the opinion that, contrary to the contentions of Phillips, the verdict of the jury was not a bar to the right of the Trustees to collect the royalty payments which had accrued under the contract on the coal already mined. *Kelley v. Ko-*

suga, 358 U. S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 549, 22 S. Ct. 431, 46 L. Ed. 679; *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.,* 236 U.S. 165, 35 S. Ct. 398, 59 L. Ed. 520."

As to Defendant's Second Defense, the alleged illegality of the Welfare and Retirement Clause of the Agreement, we find that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law with respect to the legal sufficiency of the defense raised.

Defendant's Counterclaim, being based upon the same allegation of illegality as presented in Defendant's Second Defense, must likewise fail as a matter of law.

II. *The Estoppel — Modification Issue.*

Defendant's Third Defense to both Counts of the Complaint raises allegations of fact that in February 1965 defendant permanently closed its mining operations, and that following the closing the President of District 3 of the United Mine Workers of America met with Defendant's officers and urged Defendant to reopen its mining operations. Defendant replied that its operations could not reopen unless there was sufficient increase in productivity of the employees to permit it to pay the royalties of the Trustees and eliminate further losses to the Defendant. Defendant alleges that the United Mine Workers of America District President stated that if the mines were reopened the productivity per employee would increase sufficiently to enable Defendant to meet its obligations under the Agreement.

Defendant alleges that at the time it could not reasonably have determined the falsity of this representation, but that in reliance thereon it reopened its mines and the increase in productivity did not occur.

Defendant's Answer pleads that the Plaintiffs are barred by the doctrine of equitable estoppel from enforcing the royalty payments or accelerating the promissory note payments subsequent to the time of reopening the mines until the increased productivity so promised has been achieved. In its brief Defendant alleges that this representation and Defendant's action in reliance thereon form a subsequent modification of the 1964 Agreement.

For the purpose of the Motion for Summary Judgment, Plaintiffs admit that the statements were made and concedes the authority of the District President to make them.

What factual issue now remains in dispute? It seems to us that the courts have passed upon the legal issues raised by this Third Defense in a number of cases. *Lewis v. Benedict Coal Corp.* (cit. supra), established that the obligation to pay royalty was part of the miners' compensation, and was due and payable when the coal was produced, and that neither the actions of the United Mine Workers of America nor the Trustees could defeat that obligation. Nor could an alleged breach of trust by the Trustees of the Fund defeat the obligation, *Lewis v. Mill Ridge Coals, Inc.* 298 F. 2d 552, (6th Cir., 1962). Even if the United Mine Workers of America or the Trustees were found to be in violation of the federal anti-trust laws, the Trustees can recover

the royalty on the coal already produced, *Lewis v. Pennington* (cit. supra). The Trustees can recover the royalty despite a plea of fraud in the inducement of the execution of the Agreement on the part of the United Mine Workers of America, *Lewis v. Mearns,* 168 F. Supp. 134 (D.C. N.D. W.Va., 1958), affd. 268 F. 2d 427 (4th Cir. 1959).

The oral modification claimed by Defendant here would be contrary to Federal public policy enunciated by Congress in 29 U.S.C.A. 186 (c) (5) (B) regulating the establishment of welfare trusts and requiring that their terms be specified in detail in writing. Therefore, any defense that may be made under state law or policy governing subsequent oral modification of a written contract must yield to the federal legislation which controls the field, *Lewis v. Harcliff Coal Co.,* 237 F. Supp. 6, 8 (W.D. Pa., 1965).

It was the intent of Congress that such trusts under § 302 (c) (5) be separate and apart from the union and employer creating the trust. *United Marine Division v. Essex Transportation Co.* 216 F. 2d 410 (3rd Cir., 1954). It was so held with respect to the trust in the present case. *Lewis v. Quality Coal Corp.,* 247 F. 2d 769 (7th Cir., 1957), cert. den. 355 U. S. 882. Nor are the beneficiaries of the trust, as third-party beneficiaries, subject to such defenses or set-offs as asserted here. *Lewis v. Benedict,* (cit. supra) held that this is not a typical third-party beneficiary contract because the promissor's interest goes beyond the promise to pay the royalty, it goes to the soundness and management of the Fund in which it assumed an equal responsibility with the Union.

The Supreme Court stated, at 361 U. S. p. 470:

> ". . . we hold that the parties to a collective bargaining agreement must express their meaning in unequivocal words before they can be said to have agreed that the union's breaches of its promises should give rise to a defense against the duty assumed by the employer to contribute to a welfare fund meeting the requirements of § 302 (c) (5)."

As to Defendant's Third Defense we find no genuine issue as to any material fact. We therefore conclude that Defendant's defense of equitable estoppel or oral modification of the Agreement is foreclosed by *Benedict* and the cases which followed it.

Defendant denied knowledge in its Answer of the citizenship of the Plaintiffs for diversity purposes. Plaintiffs have filed an affidavit of citizenship which has not been contested. We therefore take this factual issue as admitted and find that diversity exists.

The above opinion has considered all defenses raised. There being no dispute as to the balance remaining unpaid on the note or the amount of coal produced during the period in question, the court finds no factual question remaining open which prevents complete disposition of this matter by Summary Judgment.

Order for Summary Judgment

This cause came on to be heard on the motion of the Plaintiffs for a Summary Judgment as authorized by Rule 56 of the Federal Rules of Civil Procedure, and it appearing from the pleadings, documentary exhibits and affidavits filed that there is no genuine issue as to any

material fact and that the plaintiffs are entitled to judgment as a matter of law, it is ORDERED, ADJUDGED and DECREED that Summary Judgment be entered as follows:

1. For the Plaintiffs and against the Defendant under Count I of the Complaint in the sum of $52,441.82, with interest from July 16, 1965, at the rate of 6% per annum.

2. For the Plaintiffs and against the Defendant under Count II of the Complaint in the sum of $38,110.93, with interest from June 30, 1965, at the rate of 6% per annum.

3. For Plaintiffs and against Defendant under Defendant's Counterclaim.

with Plaintiff's costs of action.

Dated this 14th day of July, 1966.

s/ GERALD J. WEBER
United States District Judge

cc: KENNETH J. YABLONSKI, ESQ.
Washington Trust Building
Washington, Pennsylvania

VAL J. MITCH, ESQ.
HAROLD H. BACON, ESQ.
T. G. DUDLEY, ESQ.
907 Fifteen St. N. W.
Washington, D. C. 20005

JAMES Q. HARTY, ESQ;
REED, SMITH, SHAW & MCCLAY, ESQS.
Union Trust Building
Pittsburgh, Pennsylvania

Amended Order for Summary Judgment

In accordance with Motion of the defendant and by agreement of the plaintiffs by letter attached hereto, the Order for Summary Judgment entered in the above matter on July 14, 1966, is hereby AMENDED as follows:

"1. For the Plaintiffs and against the Defendant under Count I of the Complaint in the sum of $51,349.29, with interest from July 16, 1965, at the rate of 6% per annum."

In all other respects said Order shall remain in full force and effect.

Dated this 2nd day of August, 1966.

s/ GERALD J. WEBER
United States District Judge

cc: KENNETH J. YABLONSKI, ESQ.
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JAMES Q. HARTY, ESQ;
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Union Trust Building
Pittsburgh, Pennsylvania

(Opinion of the Court filed August 16, 1967)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16161

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950

v.

SEANOR COAL COMPANY, A CORPORATION,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued March 10, 1967

Before McLAUGHLIN, HASTIE and FREEDMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed August 16, 1967

FREEDMAN, *Circuit Judge*:

The trustees of The United Mine Workers of America Welfare and Retirement Fund of 1950 brought this action against Seanor Coal Company, the appellant, for royalty payments for forty cents per ton as fixed by the national Bituminous Coal Wage Agreement as amended in 1964, on coal produced by the company between February 1 and June 30, 1965. They claimed also the balance on a promissory note which they alleged was

accelerated because of the default in the payment of royalties. The company counterclaimed for payment it had made earlier into the welfare and retirement fund under the forty cents royalty provision of the agreement.[1] The court below entered summary judgment in favor of the plaintiffs for the royalties, amounting to $38,110.93 with interest, and for the unpaid balance of the note in the amount of $52,441.82 with interest, and also entered summary judgment in favor of the plaintiffs on the company's counterclaim. (256 F.Supp. 456 (W.D.Pa. 1966)). The company presents a number of issues. It asserts that (1) the agreement requiring the payment of royalties violates the Sherman Antitrust Act; (2) it also violates § 8(e) of the National Labor Relations Act; and (3) the union did not fulfill an oral agreement made by the president of the local union on which the company relied in reopening its mine, which relieved it of its contractual obligation to pay royalties.

I.

In support of its contention that the provision for the payment of royalties under the agreement is illegal under the hot cargo prohibition of § 8(e) of the National Labor Relations Act, the company relies upon two decisions of the National Labor Relations Board. *Raymond O. Lewis,* 144 N.L.R.B. 228 (1963), held invalid under § 8(e) the subcontracting provision of the 1958 National Bituminous Coal Wage Agreement which required that the terms and conditions of employment of subcontracting operations be at least as favorable as

1. The counterclaim was in the amount of $88,322.20, representing payments made at forty cents per ton.

those fixed for employees of signatories of the agreement. Later, the board dealt with the subsequent 1964 agreement, which discontinued this requirement but added a new provision which in addition to increasing from thirty to forty cents the royalty payments to the fund for every ton of coal produced by the operator for use or for resale, also required for the first time an eighty cent royalty on coal which an operator acquired from a nonsignatory.[2] The Board held that this new provision also violated § 8(e). *Raymond O. Lewis,* 148 N.L.R.B. 249 (1964). The first decision, dealing with the 1958 agreement, came before the Court of Appeals for the District of Columbia, which remanded the case to the Board for reconsideration in the light of recent decisions rejecting the Board's interpretation of § 8(e) *Lewis v. NLRB,* 350 F.2d 801 (D.C.Cir. 1965). The court noted that its action undermined the Board's finding in the second case that the 1964 amendment violated § 8(e).[3] A trial examiner's subsequent decision that the 1964 agreement violated § 8(e) has not yet been acted on by the Board.

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2. The new addition, somewhat circumstantially phrased reads: "On all bituminous coal procured or acquired by any signatory Operator for use or for sale there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so produced or acquired on which the aforesaid sum of forty (40¢) per ton has not been paid into said fund prior to such procurement or acquisition."

3. See 350 F.2d at 802, n. 12.

The court below believed that the question whether the provision of the 1964 agreement was illegal as an unfair labor practice under § 8(e) was one for the exclusive jurisdiction of the Board. We believe it is unnecessary to decide this question.[4] For even if the Board should again reach the same conclusion regarding the provision before it, the company would not thereby be relieved of its obligation to pay the royalties here involved. The Board dealt in the first case with an entirely different provision from that which is here involved; and in the second case it dealt not with the forty cent royalty which is here involved, but with the effect of that provision in relation to the establishment for the first time in the 1964 agreement of a difference in the royalties exacted from an operator if he purchased from nonsignatory rather than from other signatory operators, and required him to pay double royalties where the purchase was from nonsignatory operators.

It is clear, therefore, that the Board has not decided or even cast any doubt on the validity of the basic royalty provision of forty cents per ton but instead has limited its inquiry to the effect under § 8(e) of the exaction from the coal operators of the doubled royalty where they purchased coal from outside, nonsignatory operators. The basic provision of forty cents royalty per ton for coal produced by the employer is radically different from the special provision requiring an eighty

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4. Compare San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) with Vaca v. Sipes, 386 U.S. 171 (1967); Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966); Comment, 113 U.Pa.L.Rev. 1104 (1965).

cents royalty on coal acquired from outside nonsignatory operators and standing alone is beyond the range of § 8(e). The essence of a proscribed "hot cargo" agreement is that it applies pressure on an employer, directly or indirectly, to require him to cease doing business with a third party in order to persuade the third party to accede to the union's objectives.[5] Its focus, therefore, is on the effect of the agreement upon the relationship of the employer who is the party to the collective bargaining agreement with an outside employer. The Board recognized this in its second decision in *Raymond O. Lewis, supra,* where it held that the requirement of an eighty cent royalty on coal acquired from nonsignatory operators was to restrain signatory operators from acquiring coal from nonsignatories and thus to limit the coal operators' relationships to other operators who had signed a union contract. This element of discrimination is of course absent from that portion of the agreement which fixes the forty cent royalty, for that has no relation to purchases from nonsignatory operators, and indeed existed independently of it before 1964.

In these circumstances, any finding by the Board that the 1964 agreement is invalid under § 8(e) would not affect the severable basic royalty provision.[6] Section 8(e) does not invalidate an entire collective bargaining agreement because it contains a "hot cargo"

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5. National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967); A. Duie Pyle, Inc. v. NLRB, — F.2d — (3 Cir. 1967).

6. See NLRB v. Rockaway News Supply Co., Inc., 345 U.S. 71 (1953).

provision; the statute merely makes a contract with such a provision unenforceable and void to the extent that it contains the "hot cargo" provision.[7] Indeed, it is particularly requisite in a case such as this not to allow the possible invalidity of a provision which is not operative as to these parties to afford a basis for noncompliance with a valid obligation, for the Supreme Court has pointed out that royalty payments into a welfare fund which are bargained for have the characteristics of compensation to the workers for their services.[8]

II.

The company's claim that the agreement violates the Sherman Antitrust Act is not a defense to the trustees' action. It is now well established that the remedy for violation of the antitrust law is not avoidance of payments due under a contract, but rather the redress which the antitrust statute establishes, — a private treble damage action. *Kelly v. Kosuga,* 358 U. S. 516 (1959); *Bruce's Juices, Inc. v. American Can Co.,* 330 U. S. 743 (1947). See also *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* —— F.2d ——, —— (3 Cir. 1967). To permit avoidance of payments required under the contract would go beyond the remedy prescribed by the antitrust statute and, as the Supreme Court has pointed out in *Bruce's Juices, Inc. v. American Can Co., supra,* at 756-57, would have the incongruous effect of affording an injured party simple compensatory damages where he is a defendant while allow-

7. § 8(e), 29 U.S.C. § 158(e).

8. Lewis v. Benedict Coal Corp., 361 U.S. 459, 469 (1960).

ing him to treble the identical damages where he is a plaintiff. Moreover, the general rule is especially applicable here, where as we have already pointed out the payments required by the contract have the characteristics of compensation to the employees for services they have already rendered.[9] The company claims, however, that the case falls within the exception prescribed where judicial recognition of the contract would work to enforce "the precise conduct made unlawful by the Act."[10] This exception is of no avail to the company, for it is directed to cases where the contract price itself has been inflated because of unlawful price fixing, whereas here there is involved a contract valid on its face and the fact that it provided the occasion for a restrictive agreement does not require that it should itself be invalidated.

III.

The company's final defense is the alleged oral modification of the 1964 agreement. It asserts that shortly after it had terminated operation of its mine in February 1965 because of heavy losses, it reopened the mine in reliance upon the statement of the president of the local union that if it did so "the productivity per employee would increase sufficiently to enable the Defendant to meet its obligations under the labor contract." The company alleges that this statement was intended to induce it to reopen the mine and to incur new and additional obligations including the royalties, and that in reliance on the representation it reopened the mine but that "the increase in productivity per em-

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9. Lewis v. Benedict Coal Corp., supra, p. 8.

10. Kelly v. Kosuga, supra at 520.

ployee promised and represented . . . has in fact not occurred."

In its pleading the company presented these claims as establishing an estoppel against the plaintiffs from claiming that any royalties were due. In the court below and here, however, it has apparently abandoned this contention and instead relies upon the circumstances as creating an oral modification of the agreement to pay royalties.

We come then to the question whether there was a valid oral modification of the agreement which absolves the company of the requirement to pay the forty cents per ton royalty.

At the outset it may be observed that the alleged agreement might well be declared ineffective because it lacks definiteness and is vague and uncertain.[11] There is, however, a more fundamental objection to the alleged oral modification; this objection is based on § 302(c)(5), 29 U.S.C. § 186(c)(5), of the Labor-Management Relations Act, the provision under which the fund was established. This provision was written into the statute because of the special concern of Congress over the welfare fund of the United Mine Workers of America, which already was in existence and which Senator Taft described as administered without restriction by the union so that "practically the fund became a war chest . . . for the union."[12] It was part of the larger congressional

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11. Zukoski v. Baltimore & Ohio Railroad Co., 315 F.2d 622, 625 (3 Cir. 1963), cert. denied, 375 U.S. 856 (1963).

12. 93 Cong. Rec. 4746, reprinted in 2 Legis. Hist. of the Labor-Management Relations Act, 1947, pp. 1310-

concern over corruption of union officials and coercion of employers, to the detriment of honest bargaining relationships.[13] In § 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, Congress therefore imposed a maximum penalty of imprisonment for one year and a fine of $10,000 for violation of its provisions, which prohibited in broad terms, with certain narrow exceptions, both the payment of anything of value by an employer and its receipt by a representative of any of his employees. One of the exceptions (§ 302 (c) (5), 29 U.S.C. § 186 (c) (5) permitted employer contributions to welfare trust funds under rigid safeguards . It required that the fund be for the sole and exclusive benefit of the employees and their families and dependents, that all payments be held in trust to pay out only certain specified benefits,[14] that " the detailed basis on which such payments are to be made is specified in a written agreement with the employer," that the employees be equally represented with the employers in the administration of the fund, together with neutral persons, that there should be an annual audit of the fund and a statement of the audit be made available for in-

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11. See also S. Rep. 105, 80th Cong., 1st Sess. 52 (Supplemental Views), reprinted in 1 Legis. Hist. 458; 93 Cong. Rec. 3565-66, 3569, 1 Legis Hist. 754-57; 93 Cong. Rec. A1910, 1 Legis. Hist. 869 (remarks of Rep. Meade); 93 Cong. Rec. 4678, 2 Legis. Hist. 1305 (remarks of Sen. Byrd); 93 Cong. Rec. 5015, 2 Legis. Hist. 1498 (remarks of Sen. Ball).

13. See Arroyo v. United States, 359 U.S. 419 (1959); United States v. Ryan, 350 U.S. 299 (1956).

14. § 302 (c) (5) (A), 29 U.S.C. § 186 (c) (5) (A).

spection by interested persons[15] and that payments intended for pensions and annuities be made to a separate trust to be used solely for that purpose.[16]

The requirement that "the detailed basis on which *such payments* are to be made is specified in a written agreement with the employer . . ." (§ 302 (c) (5). (B), 29 U.S.C. § 186 (c) (5) (B)) is not free from ambiguity. The same phrase, "such payments," appears in the proviso in § 302(c) (5) (A), 29 U.S.C. § 186(c) (5) (A), where it clearly refers to payments made by the employer. In § 302(c) (5) (B), 29 U.S.C. § 186(c) (5) (B), however, the language seems to look to payments to be made out of the fund by the trustees to the employees. We may not, however, determine the meaning of the provision by a microscopic study of its language in order to decide whether "such payments" refers only to those made by the employer to the trust fund or only to those made by the trustees to the employees. We have recently been reminded of the particular emphasis which must be given to the legislative history of labor legislation,[17] and the duty which rests on the federal courts to fashion a body of federal common law for the enforcement of collective bargaining agreements.[18] It would be, at the least, incomplete to require for the

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15. § 302 (c) (5) (B), 29 U.S.C. § 186 (c) (5) (B).

16. § 302 (c) (5) (C), 29 U.S.C. § 186 (c) (5) (C).

17. National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612 (1967); NLRB v. Allis-Chalmers Mfg. Co., — U.S. — (1967).

18. Lewis v. Benedict Coal Corp., 361 U.S. 459, 470 (1960).

benefit of the employees and to prevent collusive or fraudulent side arrangements between employers and union representatives that the benefits which the employees are to receive from union welfare funds shall be specified in a written agreement with the employer and yet to permit the written foundation on which the welfare fund rests, in this case calling for the amount of the royalties payable on coal mined, to be the subject of oral modifications. It would expose employer and union representatives alike to the temptations of corrupt bargains, for it would permit the union to extract from an employer a secret promise to pay some other amount into the fund without requiring such payments to become a matter of record and thus would frustrate the purpose of § 302(c) (5). Moreover, the employees have a right to know if the obligation to make the payments into the fund is modified; otherwise they might be led to remain at their jobs in reliance on the benefits which the formal agreement has promised, after they have been eroded by oral modification of the obligation to make the payments supporting such benefits. Thus, the policy of § 302(c) (5) requires that any modification of the basis of both the payments into the fund and out of the fund be made in writing. Thereby, we also preserve the prophylactic effect of informing not only the employees, but all other employers similarly situated, who should know what the arrangement is without fear of surreptitious side agreements. Congress knew that agreements such as the National Bituminous Coal Wage Agreement were the result of industry-wide bargaining and were to bind numerous employers. It knew, of course, that the elaborate collective bargaining agree-

ments which resulted were reduced to writing;[19] it could hardly have intended that individual operators should be permitted to enter into oral side agreements with local union officials cancelling out those provisions dealing with the significant subject of payments into the union welfare fund. Whatever ambiguity lurks in the phrase "such payments" does not justify a conclusion that the provision for payment contained in the written collective bargaining agreement may be removed by oral arrangement. On the contrary, it would take clear and unambiguous language to prescribe that in order to fall within the exceptions to the criminal sanctions of § 302 only the detailed basis for the payments by the welfare fund to the employees but not the payments by the employer into the fund must be specified in the written agreement with the employer.

We hold therefore that an oral modification which would have suspended the payment of the forty cents per ton royalty into the fund by the employer was ineffective because it violated § 302(c) (5) (B).[20] Nothing in our decision in *Lewis v. Mears*, 297 F.2d 101 (3 Cir. 1961), cert. denied, 369 U.S. 873 (1962), forecloses this conclusion. That case held only that parole evidence was admissible to show that the written agreement to make payments into a welfare trust never became effec-

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19. See § 8(d), 29 U.S.C. § 158(d); H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

20. See Lewis v. Lowry, 295 F.2d 197, 200 (4 Cir. 1961), Sobeloff, Ch. J., dissenting cert. denied, 368 U.S. 977 (1962). See also Lewis v. Mears, 297 F.2d 101, 105 (3 Cir. 1961), Biggs, Ch. J. dissenting from denial of rehearing en banc, cert. denied, 369 U.S. 873 (1962).

tive because it was not fully executed and delivered. Here, on the other hand, it is agreed that a valid written contract existed which obligated the company to make royalty payments into the fund, under which the company in fact made substantial payments, but a claim is made of an oral arrangement which later suspended or modified it. Such an oral agreement to suspend or modify an existing written contract falling within § 302(c) (5) (B) is invalid and there can be no estoppel against the assertion of the public policy which condemms it.

The judgment of the district court will be affirmed.

MCLAUGHLIN, *Circuit Judge,* dissenting.

The appeal here is from the granting of a motion for summary judgment by the District Court. The significant facts are simple and admitted. The union involved, through its president whose authority is conceded, agreed with appellant mine owner that if the latter would reopen its mines (which it had permanently closed) the employee productivity would increase sufficiently to enable the mines owner to meet all its obligations under an existing collective bargaining contract. Relying on that agreement, which clearly modified the underlying agreement requiring appellant to pay royalties to the union's welfare fund, appellant opened its mines. The employees did not increase their productivity and so enable appellant to pay royalties to the welfare fund. As a result appellant had to shut down its mines. Notwithstanding that situation, the trustees of the welfare fund brought this suit for said royalties

and in the face of the above facts, the District Court granted the trustees' motion for summary judgment.

Both equitable estoppel and oral modification of the 1964 labor contract were urged by appellant in the District Court as defeating the present action. The trial judge held that such oral modification was against public policy on the strength of Lewis v. Harcliff Coal Co., 237 F.Supp. 6, 8 (W.D.Pa. 1965). The oral agreement there was prior to the written contract. The decision is no authority to uphold the brazen repudiation of the subsequent oral agreement in this appeal. This Court in Burlesque Artists Assn. v. Hirst Enterprises, Inc., 267 F.2d 414 (3 Cir. 1959) affirmed a judgment where the jury had found that there had been a valid subsequent oral addition to the original written labor agreement. This recognition of subsequent oral modification of collective bargaining contracts is viewed as sound in labor arbitration practice. Gertman Co., Inc., 45 LA 30 (Thomas Kennedy Arbitration 1965). Metropolitan Transit Authority, 39 LA 849 (W. Fallon Arbitration, 1965).

The District Court considered that the modification to the original agreement under 29 U.S.C.A. 186(c) (5) (B) had to be in writing. The majority opinion does not agree with that. It cautiously considers that the statute "is not free from ambiguity". However, it never does construe it and simply goes on to fashion new law to support this judgment. I think it very clear that Section 302(c) (5) (B) of the L.M.R. Act does not touch the validity of the oral modification before us. In our Bey v. Muldoon, 354 F.2d 1005 (3 Cir. 1966) we affirmed

the District Court in holding regarding 302(c) (5) (B) that "Reference to the legislative history shows that the Act was intended to prohibit any receipt of money by unions from employers unless the precise use to which the money shall be put is deliniated." Absent a statutory provision that the oral modification involved is required by statute to be in writing that subsequent agreement is itself a valid contract. United Shoe Workers, etc. v. LeDanne Footwear, Inc., 83 F.Supp. 714 (D.Mass. 1949).

The District Court not only disposed of the above most substantial controverted issue by summary judgment but also disposed of appellant's affirmative defenses of illegality. It is impossible to conjure away the vital fact questions raised. Appellant contended that the Welfare and Retirement Fund clause of the National Bituminous Coal Wage Agreement was illegal under either or both the National Labor Relations Act and The Sherman Antitrust Act. The District Court opinion concedes that the 1964 Amendment to the Welfare and Retirement Clause of the said Agreement with respect to its 80 cents per ton payment into the Fund by the signatory operator was held to be violative of Section 8(e) of the National Labor Relations Act. The motion of the union to have the Amendment declared valid was denied by the Board. The finality of the decision of that issue was stated by the District Court as still pending. Confronted by that inescapable situation, the Court disposed of the problem by holding that the plaintiffs' claim in this suit was not under the 80 cents provision of the Amendment but the older 40 cents provision, stating that "this being so, then the partial or even the en-

tire invalidity of the Agreement would not alter the obligation to pay for the work already performed." From any reasonable viewpoint such an arbitrary disposal of the 1964 Amendment cannot be accomplished on this summary motion. At the very least appellant is entitled to its day in court to show the intent of the parties with reference to the Amendment. Genuine, substantial questions of fact were presented to the District Court. They called for a trial on the merits of those issues, including the counter-claim of the defendant.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,161

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950.
Appellee

v.

SEANOR COAL COMPANY, a corporation
Appellant

SUR PETITION FOR REHEARING

Present: STALEY, CHIEF JUDGE, MCLAUGHLIN, KALODNER, HASTIE, SMITH, FREEDMAN, SEITZ, VAN DUSEN, CIRCUIT JUDGES.

The petition for rehearing filed by Seanor Coal Company, a corporation, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

ABRAHAM L. FREEDMAN
Judge

Dated: September 28, 1967

National Bituminous Coal Wage Agreement of 1950 As Amended Effective April 2, 1964

WHEREAS on September 29, 1952, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as "Operators"), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952"; and said Operators, signatory to this Agreement, have now registered with the United Mine Workers of America certain additional amendments to said "National Bituminous Coal Wage Agreement of 1950" and it is the agreement and intent of all parties hereto to amend and supplement and as amended and supplemented to carry forward and preserve the terms and conditions of said "National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952", said "National Bituminous Coal Wage Agreement of 1950" and all previous Agreements as therein provided:

NOW, THEREFORE, THIS AGREEMENT, effective April 2, 1964, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional association, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as "Operators"), as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as "Mine Workers") on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first

parties, amends, modifies and supplements and, as amended, modified and supplemented, carries forward and preserves the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950 as amended September 29th, 1952", the "National Bituminous Coal Wage Agreement of 1950", and all previous Agreements as therein provided, such amendments, modifications and supplements being as follows, to wit:

MINE SAFETY PROGRAM

Amend the "MINE SAFETY PROGRAM" section of the Agreement by striking out all of the language and inserting in lieu thereof the following:

"(a) *Mine Safety Code*

"The Federal Mine Safety Codes for Bituminous Coal and Lignite Mines of the United States, Part I-underground mines and Part II-strip mines, promulgated and approved October 8, 1953, by the Secretary of the Interior are hereby adopted and incorporated by reference in this contract as a code for health and safety in bituminous and lignite mines of the parties of the first part.

"(b) *Enforcement*

"(1) Reports of the Federal coal mines inspectors: Whenever inspectors of the Federal Bureau of Mines, in making their inspections in accordance with authority as provided in Public Law 49 and Public Law 552 find there are violations of the Federal Mine Safety Code and make recommendations for the elimination of such noncompliance, the Operators shall promptly comply with such recommendations, except as modified in paragraph two of this subsection.

"(2) Whenever either party to the contract feels that compliance with the recommendations of the Federal mine inspectors as provided above would cause irreparable damage or great injustice, they may appeal such recommendation to the Joint Industry Safety Committe as hereinafter provided.

"(c) *Review and Revision*

"In order to carry out the intent and purposes of the agreement affecting the Federal Mine Safety Code it is agreed that representatives of the United Mine Workers of America and the coal operators signatory hereto shall hold joint consultations with the United States Bureau of Mines looking toward review and appropriate revision of the Federal Mine Safety Code. Any revised code that is agreed upon between the aforementioned parties, when adopted by the parties, shall be adopted and incorporated by reference into this Agreement in place of the code adopted and incorporated in the National Bituminous Coal Wage Agreement of 1950 and continued under this Agreement.

"(d) *Joint Industry Safety Committee*

"There is here established under this Agreement a Joint Industry Safety Committee composed of four members, two of whom will be appointed by the Mine Workers and two of whom will be appointed by the Operators, whose duty it shall be to (1) arbitrate any appeal which is filed with it by any Operator or any mine worker who feels that any reported violations of the Code and recommendation of compliance by a Federal Coal Mine Inspector has not been justly reported or that the action required of him to correct the violation

would subject him to irreparable damage or great injustice; and (2) to consult with the U. S. Bureau of Mines in accordance with the provisions of Section (c) above.

"(e) *Mine Safety Committee*

"At each mine there shall be a Mine Safety Committee selected by the local union. The Committee members while engaged in the performance of their duties shall be paid by the local union, but shall be deemed to be acting within the scope of their employment in the mine within the meaning of the Workmen's Compensation law of the state where such duties are performed.

"The Mine Safety Committee may inspect any mine development or equipment used in producing coal. If the Committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the Committee believes an immediate danger exists and the Committee recommends that the management remove all mine workers from the unsafe area, the Operator is required to follow the recommendation of the Committee.

"If the Safety Committee in closing down an unsafe area acts arbitrarily and capriciously, members of such Committee may be removed from the Committee. Grievances that may arise as a result of a request for removal of a member of the Safety Committee under this section shall be handled in accordance with the provisions providing for settlement of disputes.

"The Safety Committee and Operators shall maintain such records concerning inspections, findings, rec-

ommendations, and actions relating to this provision of the Agreement as may be required, and copies of all reports made by the Safety Committee shall be filed with the Operators.

"(f) The International Union, United Mine Workers of America, may designate memorial periods not exceeding a total of ten (10) days during the term of this Agreement, provided it shall give proper notice to each district."

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950

Amend the first printed paragraph of subsection A of this clause by striking out all of the second sentence beginning with the word "During" and ending after the word "sale" and inserting in lieu thereof the following: "During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition.

Amend the eleventh printed paragraph of subsection A by substituting a semicolon for the period at the end of the first sentence and adding the following: "together with a monthly statement showing the full amount due hereunder on all bituminous coal procured or acquired from any mine, preparation plant or facility other than those owned or operated by such signatory Operator, all as hereinabove set out and provided."

Amend the second sentence of the thirteenth printed paragraph of Subsection A by inserting a comma after the word "mine" and then adding the following: "preparation plant or other facility" and further amend the thirteenth paragraph by striking out the words "obligation hereunder" at the end of the paragraph and substituting in lieu thereof the following: "any of the obligations hereunder."

APPLICATION OF CONTRACT TO COAL LANDS

Amend the section denominated "Application of Contract to Coal Lands" by striking out the language of that section and inserting in lieu thereof the following:

"As part of the consideration for this agreement, the Operators signatory hereto agree that this Agreement covers the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The Operators agree that they will not lease, license or contract out any coal lands, coal producing or coal

preparation facilities for the purpose of avoiding the application of this Agreement or any section, paragraph or clause thereof."

WAGES AND HOURS

Amend the "WAGES AND HOURS" section of the National Bituminous Coal Wage Agreement of 1950 by striking out all of the language and substituting the following:

"(a) For all inside employees a work day of eight hours from portal to portal is established including a staggered thirty minutes for lunch, and without any intermission or suspension of operation throughout the day. For inside day workers these eight hours shall be paid for at straight time rate. Overtime beyond eight hours per day and forty hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time rates for inside day workers shall be the total daily normal shift earnings for eight hours divided by eight (8) hours.

"(b) For all outside employees except those covered in paragraph (c) hereof (Including all strip mine and coke oven employees), a work day of seven hours and fifteen minutes is established including a staggered thirty minutes for lunch, and without any intermission or suspension of operations throughout the day, These seven hours and fifteen minutes shall be paid for at straight time rate. Overtime beyond seven hours and fifteen minutes per day and thirty-six and one-quarter hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time earnings for outside day workers covered by this paragraph shall

be the total daily normal shift earnings for seven hours and fifteen minutes divided by seven and one-quarter (7.25) hours.

"(c) For all outside continuous employees who are engaged at power houses, sub-stations and pumps operating continuously for twenty-four (24) hours daily, and hoisting engineers, a work day of eight hours is established including a staggered thirty minutes for lunch and without any intermission or suspension of operations throughout the day. These eight hours shall be paid for at straight time rate. Overtime beyond eight hours per day and forty hours per week shall be paid for at time and one-half with no pyramiding of overtime. Straight time earnings for day workers covered by this paragraph shall be the total daily normal shift earnings for eight hours divided by eight (8) hours.

"(d) All mine workers, whether employed by the month, day or tonnage, yardage, deadwork or footage rate, shall receive, effective April 2, 1964, fifteen dollars and twenty-five cents ($15.25) per day in addition to that provided for in the contract which expired March 31, 1946, and effective January 1, 1965, sixteen dollars and twenty-five cents ($16.25) per day in addition to that provided for in the contract which expired March 31, 1946.

"(e) Employees who are required to work on holidays shall be paid at double time or double rates. The following holidays shall be observed: New Year's Day, April 1st, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. If one of the foregoing holidays falls on Sunday, it shall be cele-

brated the following Monday, and if one of the foregoing holidays falls on Saturday, it shall be celebrated on the preceding Friday.

"(f) Rockdusting shall be done at the expense of the coal operator.

"(g) It is understood and agreed that roof bolters will be paid the same day rates paid to drillers and shooters on mechanical crews.

"(h) Work performed on Saturday shall be paid for at time and one-half or rate and one-half. Work performed on Sunday shall be paid for at double time or double rates. No coal will be produced or processed on Sunday, but the Operator shall be permitted to load previously mined and processed coal for shipment on Sunday, provided that the employees engaged in such loading for shipment shall be covered by this Agreement and shall be paid at double time or double rates for all work performed on Sunday.

"The Operator shall have the right to schedule maintenance crews, powerhouse and sub-station employees, pumpers, lamphouse and bathhouse men, firemen, fan attendants, switchboard operators and other similar employees for Saturday and Sunday work and schedule their days off during the first five days of the week (except continuous hoisting engineers as now provided in subsection (c) hereof). However, such employees shall be given the opportunity to work the same number of days per week as the number of days on which the mine produces coal, and shall be given equal opportunity to share the available work on premium days."

VACATION PAYMENT

Amend the "VACATION PAYMENT" section of the National Bituminous Coal Wage Agreement of 1950 by striking out the language of the section and substituting the following:

"An annual vacation of fourteen days shall be the rule of the industry. To assure consumers of a continued supply of coal and extend employment opportunities, the two separate vacation periods shall be as follows:

"Beginning at the start of the morning shift on Saturday, June 27, 1964, and ending at the beginning of the morning shift on Saturday, July 11, 1964; or beginning at the start of the morning shift on Saturday, July 11, 1964, and ending at the beginning of the morning shift on Saturday, July 25, 1964.

"Beginning at the start of the morning shift on Saturday, June 26, 1965, and ending at the beginning of the morning shift on Saturday, July 10, 1965; or beginning at the start of the morning shift on Saturday, July 10, 1965, and ending at the beginning of the morning shift on Saturday, July 24, 1965.

"The operator must make a separate written declaration for each mine he operates setting forth which vacation period he has elected to take. This declaration must be filed with the president of the respective Union District in which the mine or mines are located by May 15.

"Day men required to work during either of these periods at coke plants and other necessarily continuous operations or on emergency or repair work shall have vacations of the same duration at other agreed periods.

"All employees with a record of one year's standing from June 1, 1963, to May 31, 1964, shall receive as compensation for the 1964 vacation period the sum of $225.00 and all employees with a record of one year's standing from June 1, 1964, to May 31, 1965, shall receive as compensation for the 1965 vacation period the sum of $225.00 with the following exception: Employees who enter or return from the armed services to their jobs during the qualifying period shall receive the $225.00 vacation payment.

"All the terms and provisions of District agreements relating to vacation pay for sick and injured employees are carried forward to this agreement and payments are to be made in the sum as provided herein.

"Pro rata payments for the months they are on the payroll shall be provided for those mine workers who are given employment or who leave their employment during the qualifying period.

"The vacation payment shall be made on the last pay day immediately preceding the beginning of the respective vacation periods, except those employees who leave their employment during the qualifyng period shall receive their pro rata share of vacation payment at the time they sever their employment. In the event any employer should sell, lease, transfer, assign or otherwise dispose of his mine, he shall pay to each of his employees his pro rata share of vacation payment on the day of such sale, assignment or lease.

"Failure of any operator signatory hereto to make full and prompt payment of the amounts required hereby, in the manner and on the dates herein provided, shall

at the option of the United Mine Workers of America, be deemed a violation of this Agreement. This obligation of each Operator signatory hereto which is several and not joint, to so pay such sums, shall be a direct and continuing obligation of said Operator during the life of this Agreement; and it shall be deemed a violation of this Agreement if any mine, to which this Agreement is applicable, shall be sold, leased, sub-leased, assigned or otherwise disposed of for the purpose of avoiding the obligation hereunder."

SETTLEMENT OF LOCAL AND DISTRICT DISPUTES

Amend the "SETTLEMENT OF LOCAL AND DISTRICT DISPUTES' section of the National Bituminous Coal Wage Agreement of 1950 by striking out all of said section below the caption and inserting in lieu thereof the following:

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately.

1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the Mine Committee.

3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators. Neither the Mine Workers' representatives on the board nor the Operators' repreeentatives on the board shall be the same persons who participated in steps (1), (2), or (3) of this procedure.

5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

DISCHARGE CASES

Amend the "DISCHARGE CASES" section of the Appalachian Joint Wage Agreement of June 19, 1941, as carried forward in the National Bituminous Coal Wage Agreement of 1950 by striking all of the language of that section and substituting the following:

"When a mine worker has been discharged from his employment and he believes he has been unjustly dealt with, it shall be a case under the 'Settlement of Local and District Disputes' clause. In all discharge cases

should it be decided under the rules of this Agreement that an injustice has been dealt the mine worker, the Operator shall reinstate and compensate him at the rate based on the earning of said mine worker prior to such discharge. Provided, however, that such case shall be taken up within five days from the date of discharge."

SENIORITY

Amend the "SENIORITY" section of the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, by striking out the present language of that section and substituting the following:

"1. Seniority at the mine shall be recognized in the industry on the following basis: Length of service and qualification to perform the work.

"2. In all cases where the working force is to be reduced, employees with the greatest seniority shall be retained providing they are qualified to perform the work.

"3. Employees who are idle because of a reduction in the working force shall be placed on a panel from which they shall be returned to employment on the basis of seniority as outlined in paragraph one.

"4. Employees who are placed on a panel shall retain the seniority earned prior to their layoff and, in order to protect their relative seniority standing, will continue to accrue seniority while on the panel.

"5. Employees who are granted a leave of absence in order to serve as a district or International officer shall retain their seniority earned prior to

their layoff and will continue to accrue seniority while serving in the capacity of union officer.

"6. Employees who are promoted to a supervisory position exempt from coverage under this Agreement for a period in excess of four months shall retain their original seniority as of the date of their promotion, but will not accumulate any seniority for the time spent in such supervisory position.

"7. Any person on the panel list who secures casual or intermittent employment during the period when no work is available for him at the operation shall in no way jeopardize his seniority rights while engaged in such temporary employment. However, any person on the panel list who secures regular employment at another operation, or outside the industry, and does not return to work when there is available employment at the mine for those in said panel, shall sacrifice his seniority rights at the operation and shall have his name removed from the panel list.

"8. The superintendent of the mine and the secretary of the local union shall be joint custodians of the panel records. It shall be the obligation of the employee to keep the custodians advised of any change of address. Notice to the last known address by certified mail shall be sufficient notice of recall. Failure to respond within a reasonable time shall be sufficient reason to remove him from the panel.

"9. Grievances which arise under the provisions of this section shall be processed under the

'Settlement of Local and District Disputes' clause of this agreement."

BATHOUSE OR WASHROOM

There shall be no charge by the operator for use of a bathhouse or washroom.

HELPERS

On each face production crew the mine operator shall designate one of the crew members as helper who, when directed, shall operate either a loading machine or any type of continuous mining equipment in the absence of the operator, but when not operating the machine shall perform such other duties as directed by the mine operator.

It is understood that the working crew is not to be increased by designation of a member as helper. The helper shall be paid the machine operator's rate for the time spent performing the duties of a machine operator.

NEW MACHINERY

The right to install and operate new types of equipment is recognized. It is agreed that upon installation of new types of equipment not already in use in the industry for which no wage rates are now established the rates for operating such equipment shall be established by agreement between the management of the mine and —subject to the approval of the International Union— the president of the United Mine Workers' District in which the new type of equipment is operated.

TERMINATION OF AGREEMENT

Amend the "TERMINATION OF AGREEMENT" section of the National Bituminous Coal Wage Agree-

ment of 1950 by striking out the present language and inserting in lieu thereof the following:

"This amended agreement dated March 23, 1964 shall be effective April 2, 1964, and is not subject to termination by any party signatory hereto prior to March 31, 1966, PROVIDED HOWEVER, That either the parties of the first part or the party of the second part may terminate this Agreement on or after March 31, 1966, by giving at least sixty (60) days' written notice to the other party of such desired termination date."

IN WITNESS WHEREOF, each of the parties signatory hereto, pursuant to proper authority, has caused this Agreement, effective April 2, 1964, to be signed by its proper officers or representatives at Washington, District of Columbia, on this 23rd day of March, 1964.

District 3
UNITED MINE WORKERS OF AMERICA
Date: April 2, 1964

W. A. BOYLE
By: JOSEPH T. KENNEDY.

EWING WATT
President, District 3

OPERATORS

SEANOR COAL COMPANY
P. O. Box 385
Saltsburg, Pennsylvania

C. A. GOLDSCHMIDT
President

FEB 20 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 951

SEANOR COAL COMPANY, a corporation, *Petitioner,*

v.

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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INDEX

Table of Contents

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Counterstatement of Questions Presented	2
Counterstatement of the Case	2
Reasons for Not Granting the Writ:	
I. There are no Substantial Federal Questions Presented	3
A. The Lower Courts, Interpreting Congressional Intent in Enacting Section 302(c)(5), Correctly Rejected an Oral Modification of a Written Trust Agreement Created Pursuant to That Statute	3
B. Petitioner's Contentions, Raised in an Effort to Create a Substantial Federal Question, Have No Basis in Fact	6
C. Section 8(e)'s Invalidation of a Severable Contract Clause Does Not Invalidate the Remainder of the Contract, to Which All Parties Conformed Their Conduct, and Under Which the Employees Labored	10
Conclusion	13

TABLE OF CASES

Arroyo v. United States (1959) 359 U.S. 419, 3 L. ed 2d 915	7
Auten v. Local 11, IBEW (D.C. S.D. Cal., 1965) 51 L. C. 19,522, 58 LRRM 2531	10

Page

Bey v. Muldoon (D.C. E.D. Pa., 1963) 223 F. Supp. 489, affirmed per curiam (C.A. 3, 1966) 354 F. 2d 1005 10

Blassie v. Kroger Company (C.A. 8, 1965) 345 F. 2d 58 8

Employing Plasterers' Asso'n. v. Journeymen (C.A. 7, 1960) 279 F. 2d 92 8

Garment Workers, Local 509 (ILGW) v. Annshire Garment Co., Inc. (D.C. Kansas, 1967) 55 L. C. 19,408 8

Lewis v. Benedict Coal Corp. (1960) 361 U.S. 459, 469, 4 L. ed 2d 442, 449 ..... 6, 12

Lewis v. Lowry (C.A. 4, 1962) 295 F. 2d 197, cert. den. 7 L. ed 2d 438 ..... 8, 9

Lewis v. Lowry (C.A. 4, 1963) 322 F. 2d 453 8

Lewis v. Mears (C.A. 3, 1962) 297 F. 2d 101, cert. den. 369 U.S. 873 ..... 8, 9

Lewis v. Owens (C.A. 6, 1964) 338 F. 2d 740 ..... 8, 9

Lewis v. Pennington (C.A. 6, 1963) 325 F. 2d 804, cert. den. (1965) 381 U.S. 949, 14 L. ed 2d 723 .. 12

Lewis v. Seanor Coal Company (C.A. 3, 1967) 382 F. 2d 437 8

Moglia v. Geoghegan (D.C. N.Y., 1967) 267 F. Supp. 641 8

NLRB v. Rockaway News Supply Company (1953) 345 U.S. 71, 97 L. ed 832 12

Seiss v. McClintic-Marshall Corp. (Sp. Ct. Pa., 1936) 324 Pa. 201 3

Sorrells v. United States (1932) 287 U.S. 435, 446-447, 77 L. ed 413, 419 5

United Mine Workers of America, et al., 165 NLRB No. 49 10

United States v. Kirby (1868) 7 Wall. 482, 487, 19 L. ed 278, 280 5

United States v. Ryan (1956) 350 U.S. 299, 100 L. ed 335 7

Wagor v. Cal Kovens Construction Corporation (C.A. 5, 1967) 382 F. 2d 813 8

Zukoski v. Baltimore and Ohio Railroad Company (C.A. 3, 1963) 315 F. 2d 622, cert. den. 375 U.S. 856 3

STATUTES

	Page
Labor Management Relations Act, 1947	2
Section 8(e)	10, 11, 12
Section 302	6, 7
Section 302(c)(5)	2, 3, 4, 5, 6, 7, 8, 11
Section 302(c)(5)(A) and (B)	5
Section 302(c)(5)(B)	9

MISCELLANEOUS

Collective Bargaining Negotiations and Contracts, The Bureau of National Affairs, Inc. (1963) pp. 44:301 et seq.	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 951

SEANOR COAL COMPANY, a corporation, *Petitioner*,

v.

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Opinions below are correctly set forth in the Petition.

JURIISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The Statutes involved are adequately set forth in the Petition.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The Respondents do not accept the Statement of Questions Presented as set forth in the Petition (p. 2).

In lieu thereof, Respondents submit the following:

I

May a trust agreement creating an employees' welfare trust pursuant to Section 302(c)(5), Labor Management Relations Act, 1947, contained in a *written* collective bargaining agreement, and which requires the employer to pay to the Fund a royalty of forty cents (40¢) per ton, be thereafter *orally modified,* so as to absolve the employer from its obligation to make payments to the trust, unless the vague and indefinite promise of an increase in the productivity per employee was achieved, sufficient to enable the employer to meet its contractual obligations?

II

Does a finding by the National Labor Relations Board that a Section 302(c)(5) trust agreement provision, which created an employer's obligation to pay eighty cents (80¢) to the welfare trust for each ton of coal purchased from a non-signatory, or non-royalty paying producer, is violative of Section 8(e)'s "hot cargo" clause, totally invalidate the other, severable provisions of the trust agreement, including the separate and distinct provision creating the employer's obligation to pay to the trust a royalty of forty cents (40¢) per ton on all coal produced by its employees.

COUNTERSTATEMENT OF THE CASE

The Petition correctly sets forth the material facts and proceedings, except that: (1) petitioner's statement that its "operations were again terminated on or about June 30, 1965 and have not been resumed"

(Pet. 9) has no record support; and (2) petitioner's inference that the oral modification defense was raised by its responsive pleadings is erroneous. The oral modification defense was first raised, and the defense of equitable estoppel abandoned, in petitioner's arguments in opposition to summary judgment in the District Court (Pet. App. 23).

REASONS FOR NOT GRANTING THE WRIT

I. THERE ARE NO SUBSTANTIAL FEDERAL QUESTIONS PRESENTED.

A. The Lower Courts, Interpreting Congressional Intent in Enacting Section 302(c)(5), Correctly Rejected an Oral Modification of a Written Trust Agreement Created Pursuant to That Statute.

An employer's requirement to pay a royalty of forty cents (40¢) per ton on all coal produced for use or sale was orally modified to require the royalty payment only if "the productivity per employee would increase sufficiently to enable the Defendant to meet its obligations [to pay the royalty] under the labor contract" (Pet. App. 40).[1] The Third Circuit declared this oral modification "ineffective".

---

[1] In moving for summary judgment, the union representative's authority to modify the terms of the trust agreement, and the fact of the modification, were necessarily admitted, but solely for purposes of summary judgment.

In both lower courts it has been consistently denied that the modification was enforceable, whether oral or written. The modification lacks the required definiteness and certainty, and is "so lacking in precision, so indefinite and vague, that nothing certain about it can be formulated." *Seiss* v. *McClintic Marshall Corp.*, (Sp. Ct. Pa., 1936) 324 Pa. 201; *Zukoski* v. *Baltimore and Ohio Railroad Company*, (C.A. 3, 1963) 315 F. 2d 622, cert. den. 375 U.S. 856. The Third Circuit agreed, observing the modification "might well be declared ineffective" on this ground alone, but decided the issue on the "more fundamental objection", that the modification was violative of Section 302(c)(5) (Pet. App. 41).

Relying on the legislative history of Section 302(c)(5), and decisions of this Court interpreting Congressional intent, the Third Circuit concluded that the concern of Congress was "over corruption of union officials and coercion of employers, to the detriment of honest bargaining relationships" (Pet. App. 42), and the protection of the interests of employee beneficiaries of 302(c)(5) trusts, required that both the employer's agreement to pay to the trust and the basis of trustees' payment from the trust to the employees, must be reduced to writing (Pet. App. 44).

The cogent, reasoned opinion of the Third Circuit, concludes the Congressional purpose in enacting Section 302(c)(5) was to insure that employees were safeguarded, both in the creation and the administration of welfare trusts. The Third Circuit determined that while the specific language of the statute was perhaps ambiguous, to carry out Congressional intent it is not necessary to "determine the meaning of [the statute] by a microscopic study of its language", and that its conclusion was in harmony with this Court's recent admonition that "the federal courts [have the duty] to fashion a body of federal common law for the enforcement of collective bargaining agreements" (Pet. App. 43). The Court then said (Pet. App. 43-44):

> It would be, at the least, incomplete to require for the benefit of the employees and to prevent collusive or fraudulent side arrangements between employers and union representatives that the benefits which the employees are to receive from union welfare funds shall be specified in a written agreement with the employer and yet to permit the written foundation on which the welfare fund rests, in this case calling for the amount of the royalties payable

> on coal mined, to be the subject of oral modifications.

And further, that any other interpretation (Pet. App. 44):

> * * * would expose employer and union representatives alike to the temptations of corrupt bargains, for it would permit the union to extract from an employer a secret promise to pay some other amount into the Fund without requiring such payments to become a matter of record and thus would frustrate the purpose of § 302(c)(5).

The Third Circuit's opinion is consistent with the conclusion of Chief Justice Hughes, who said in *Sorrells* v. *United States,* (1932) 287 U.S. 435, 446-447, 77 L. ed. 413, 419:

> Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned.

Plainly, "[t]he reason of the law in such cases should prevail over its letter." *United States* v. *Kirby,* (1868) 7 Wall. 482, 487, 19 L. ed 278, 280. The patent legislative purpose, namely, to protect employees from the possible corrupt employer-union agreements, must "prevail over [the possible ambiguity in the] letter" of Sections 302(c)(5)(A) and (B). The Third Circuit concluded, in rejecting the oral modification that (Pet. App. 45):

> Whatever ambiguity lurks in the [statutory language] does not justify a conclusion that the provision for payment contained in the written collective bargaining agreement may be removed by oral arrangement. On the contrary, it would take clear and unambiguous language to prescribe that

> in order to fall within the exceptions to the criminal sanctions of § 302 only the detailed basis for the payments by the welfare fund to the employees but not the payments by the employer into the fund must be specified in the written agreement with the employer.

To permit that portion of a 302(c)(5) trust agreement requiring an employer's payment, which has been decided by this Court to be "really another form of compensation to the employees", *Lewis* v. *Benedict Coal Corp.*, (1960) 361 U.S. 459, 469, 4 L. ed 2d 442, 449, to be oral, or if in writing, subsequently modified orally, would permit under the table, covert agreements, unknown to the employees or the trustees. The very employee benefits Congress was seeking to protect would be jeopardized.

B. Petitioner's Contentions, Raised in an Effort To Create a Substantial Federal Question, Have No Basis in Fact.

In an effort to present a federal question petitioner urges: (1) that if the Third Circuit's decision is not overruled "literally thousands of existing agreements" would be invalidated (Pet. 15); and (2) that there is "[e]vidence of a conflict in the Circuits on this question" (Pet. 17). Neither contention has basis in fact.

(1) Petitioner's argument that the Third Circuit's decision, "would render invalid and violative of law literally thousands of existing [302(c)(5) trust] agreements" (Pet. 15), is based solely upon a Bureau of National Affairs publication,[2] by some unnamed author or authors, in which Section 302(c)(5) trusts are not specifically discussed or identified, and the question of

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[2] Collective Bargaining Negotiations and Contracts, The Bureau of National Affairs, Inc., (1963) pp. 44:301 et seq.

enforceable oral trust agreements, or of the oral modification of a written trust agreement, is not even considered.

Based solely on this publication, which has no efficacy here, petitioner argues that while "[i]t is reasonable to believe that Congress was aware" of the increasing trend toward employee welfare funds, that "it is equally unreasonable to believe that they desired the Courts to stretch and twist Section 302" to control management and union operation in this area (Pet. 16). This argument must be dismissed as diametrically opposite to announced purpose of Section 302(c)(5). The enactment of Section 302(c)(5) reflects that the express Congressional purpose was to prevent management and union corruption to the detriment of the employees involved, which potential is patently possible if the employer's trust obligation may be created or modified orally. The Third Circuit, citing this Court's *Arroyo* v. *United States,* (1959) 359 U.S. 419, 3 L. ed 2d 915, and *United States* v. *Ryan,* (1956) 350 U.S. 299, 100 L. ed 335 held: "This provision was written into the statute because of the special concern of Congress over the welfare fund of the United Mine Workers of America", and that "[i]t was a part of the larger congressional concern over corruption of union officials and coercion of employers, to the detriment of honest bargaining relationships" (Pet. App. 41-42).

(2) Petitioner's second argument of "evidence of a conflict in the Circuits on this question" (Pet. 17) is equally devoid of factual basis.

No Circuit Court has decided that any portion of a 302(c)(5) trust agreement could be oral. The Third,

Fifth, Seventh and Eighth Circuits have considered the question of an employer's obligation to make payments to a welfare fund created under Section 302(c)(5), and have recognized that to comply with the section, the employer's agreement must be reduced to writing. *Employing Plasterers' Asso'n* v. *Journeymen, etc.* (C.A. 7, 1960) 279 F. 2d 92; *Blassie* v. *Kroger Company* (C.A. 8, 1965) 345 F. 2d 58; *Wagor* v. *Cal Kovens Construction Corporation* (C.A. 5, 1967) 382 F. 2d 813; *Lewis* v. *Seanor Coal Company* (C.A. 3, 1967) 382 F. 2d 437.

The two most recent District Court decisions set forth with clarity the Congressional intent and the consistent judicial interpretation of that intent. *Moglia* v. *Geoghegan* (D.C. N.Y., 1967) 267 F. Supp. 641; *Garment Workers, Local 509 (ILGW)* v. *Annshire Garment Co., Inc.* (D.C. Kansas, 1967) 55 L.C. 19,408. In *Moglia* the court said (pp. 646-647):

> The background of this law and the cases interpreting it, leave no doubt that, if there is one essential element without which these funds cannot lawfully exist, it is that there be a written agreement specifying the source and amounts of money to be paid into and to be disbursed from the Fund.

The Third, Fourth and Sixth Circuits have considered the question of prior or contemporaneous oral agreements, modifying the terms of a 302(c)(5) trust, contained in a collective bargaining agreement which was reduced to writing. *Lewis* v. *Lowry* (C.A. 4, 1962) 295 F. 2d 197, cert. den. 7 L. ed. 2d 438; *Lewis* v. *Lowry* (C.A. 4, 1963) 322 F. 2d 453; *Lewis* v. *Mears* (C.A. 3, 1962) 297 F. 2d 101, cert. den. 369 U.S. 873; *Lewis* v. *Owens* (C.A. 6, 1964) 338 F. 2d 740. In each

case the majority did not feel it necessary to reach the national labor policy question, preferring to decide the issue on the basis of standard contract law. However, in each case, a dissent, or a concurrence, would have based the decision on national labor policy. Chief Judge Sobeloff, dissenting in *Lewis* v. *Lowry* (C.A. 4, 1962) 295 F. 2d 197, said (p. 201):

> Literally read, section 302(c)(5)(B) may be thought to require that only the terms of the payments to the employees be in writing. Nevertheless, the protection of the employees is not complete unless the statute is read to require as well that the terms on which payments are to be made into the Trust Fund be similarly stated in writing. Congress could not have intended to safeguard against the improper use of money once it has been contributed to the fund, but not against evasion of the primary obligation to contribute.
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> * * * *
>
> The royalty payments are an indirect method of compensating the employees, and they have a right to know exactly what they are receiving for their services. They also have a right to know how well their union negotiators represented their interests. They are being deceived if the publicly declared, written agreement may be sapped by a secret compact.

Chief Judge Biggs, joined by Judges Staley, Ganey and Smith, dissenting in *Lewis* v. *Mears,* supra, would have followed Chief Judge Sobeloff's dissent in *Lowry.* Judge Phillips, concurring in the result in *Lewis* v. *Owens,* supra, would have preferred the dissent of Chief Judge Sobeloff in *Lowry* over the majority there, and would have decided *Owens* on the basis of national labor policy.

Petitioner cites *Auten v. Local 11, IBEW* (D.C. S.D. Cal., 1965) 51 L. C. 19,552, 58 LRRM 2531, which cited *Bey* v. *Muldoon* (D.C. E.D. Pa., 1963) 223 F. Supp. 489, to support the claimed "evidence of a conflict in the Circuits" (Pet. 17). Petitioner's contention that the Circuit Court's decision here "would appear to overrule" (Pet. 17) the prior per curiam affirmance of *Bey* v. *Muldoon* (C.A. 3, 1966) 354 F. 2d 1005, must be rejected. The Third Circuit's affirmance of *Bey,* affirms only the issue, not contested here, that the plan of payment of trust benefits to the employees must be in writing. In *Auten,* as in *Bey,* the court was not ruling on the requirement that the employer's obligation to pay to the trust be in writing, and these decisions cannot be said to be in conflict with the decision here.

C. Section 8(e)'s Invalidation of a Severable Contract Clause Does Not Invalidate the Remainder of the Contract, to Which All Parties Conformed Their Conduct, and Under Which the Employees Labored.

Petitioner's second question urges the writ should be granted because of the Third Circuit's rejection of its claim that the National Labor Relations Board's invalidation of one, severable provision of the trust agreement, as violative of Section 8(e), Labor Management Relations Act, 1947, renders invalid the entire royalty provisions of the trust agreement.[3] Petitioner's contention must be denied.

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[3] Petitioner urges the validity of the trust agreement should have been decided by "a full hearing" in the District Court. This plea ignores the fact that at the time of consideration and decision by the District Court and argument in the Third Circuit, the National Labor Relations Board had under active consideration the question of the validity of the eighty cents (80¢) royalty under "hot cargo" provision of Section 8(e) (165 NLRB No. 49, June 16, 1967). The Board's decision is at present on appeal to the District of Columbia Circuit, No. 21,129 and No. 21,226.

Here, trustees of the 302(c)(5) trust sued a signatory employer to recover royalties due the trust under the severable clause in the trust agreement, which required the employer to pay to the fund a royalty of forty cents (40¢) per ton on each ton of coal produced. The Third Circuit held that the Board's Section 8(e) determination, invalidating the eighty cents (80¢) royalty provision, could have no effect on the separate forty cents (40¢) royalty claim, which is the sole basis of trustees' action. As the Third Circuit correctly observed, the Board "limited its inquiry to the effect [of the 80¢ clause] under § 8(e)", holding (Pet. App. 37-38):

> * * * the Board has not decided or even cast any doubt on the validity of the basic royalty provision of forty cents per ton * * *. The basic provision of forty cents royalty per ton for coal produced by the employer is radically different from the special provision requiring an eighty cents royalty on coal acquired from outside nonsignatory operators and standing alone is beyond the range of § 8(e).

The Third Circuit's enforcement of the separate forty cent (40¢) royalty provision of the trust agreement is consonant with Section 8(e)'s provision that a finding of invalidity of one clause in a collective bargaining agreement, invalidated the agreement only to the extent of the tainted clause, and did not invali-

date the entire agreement.[4] Interpreting Section 8(e), the Court determined (Pet. App. 38-39):

> Section 8(e) does not invalidate an entire collective bargaining agreement because it contains a "hot cargo" provision; the statute merely makes a contract with such a provision unenforceable and void to the extent that it contains the "hot cargo" provision.

This Court's *Lewis* v. *Benedict Coal Corp.*, (1960) 361 U.S. 459, 469, 4 L. ed 2d 442, 449, holds the forty cent (40¢) royalty payments "are really another form of compensation to the employees". In *NLRB* v. *Rockaway News Supply Company* (1953) 345 U.S. 71, 97 L. ed 832, the Court refused to invalidate a contract, *ab initio,* covering the period during which the parties operated under its terms, believing it to be valid, and no authority having held it invalid. The *Rockaway* determination that "The total obliteration of this contract is not in obedience to any command of the statute" (p. 838); is equally applicable here and requires enforcement of the forty cent (40¢) provision of the contract, earned by the employees upon the production of coal. This contention is consistent with the decision in *Lewis* v. *Pennington* (C.A. 6, 1963) 325 F. 2d 804, cert. den. (1965) 381 U.S. 949, 14 L. ed 2d 723.

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[4] Section 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement *shall be to such extent unenforceable and void.* (Emphasis supplied.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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